

**ORIGINAL**

**Before the  
Federal Communications Commission  
Washington, DC 20554**

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**MAR 26 2002**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

In the Matter of )

Implementation of Competitive Bidding )  
Rule to License Certain )  
Rural Service Areas )

WT Docket No. 01-32  
FM-8897

To: The Commission

**DOCKET FILE COPY ORIGINAL**

**MOTION TO STAY AUCTION RULES**  
**PENDING JUDICIAL REVIEW**

Donald J. Evans  
Fletcher, Heald & Hildreth, PLC  
13001 North 17<sup>th</sup> Street, 11<sup>th</sup> Floor  
Arlington, VA 22209  
703-812-0400

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Ranger Cellular and Miller Communications, Inc. (Movants) hereby move the Commission to stay the rules governing Auction 45 and defer that auction until judicial review of the lawfulness of those rules is completed.<sup>1</sup> Auction 45 is scheduled to begin on May 29, 2002, with short-form applications due on April 17. On March 18, 2002, Movants filed a petition for review with the U.S. Court of Appeals in Washington seeking the vacation of the rules applicable to this auction. We do not anticipate that the Court will act on this petition until sometime in 2003, well after the auction has been completed.

Movants recognize that they must meet the four part test of *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F. 2d 921, 925 (DC Cir. 1958) in order to justify the extraordinary equitable relief of a stay. We believe that test is met here.

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<sup>1</sup> Movants suggested in their Comments with respect to Auction 45 procedures that the auction should be delayed. In DA-02-470, released March 4, 2002, the Wireless Bureau declined that suggestion. *March 4 Public Notice* at p. 2. The instant motion is filed to ensure that the full Commission has the opportunity to consider a formal request to stay the effective date of the rules.

Likelihood of Success on the Merits. We begin with the element of likelihood of success on the merits, because all of the other factors must be weighed in that light. Movants have argued to the Commission that this auction should only be open to original filers like Movants who have preserved the vitality of their applications on two grounds. First, § 309(l) of the Communications Act specifically limits eligibility for “commercial radio” auctions to applicants whose applications were on file prior to July 1, 1997. The Commission has chosen to read the words “commercial radio stations” as though they say “commercial broadcast stations,” thus removing cellular auctions from the ambit of that section. This is a very strange interpretation indeed since everywhere else in the Act where Congress meant to limit the application of the law to broadcasters, it uses the words “broadcasting station.” On the very face of it, the Commission’s refusal to give effect to the plain, actual words of the statute imparts a substantial likelihood that Movants will prevail on the merits. This is especially so since the DC Circuit has already espoused, *in dicta*, the exact view propounded by Movants. See *Bachow Communications, Inc. v. FCC*, 345 U.S.App.D.C. 45, 237 F.3d 683 (D.C.Cir. 2001).

Second, even if Congress had not expressly limited the auction to pre-1997 filers, a solid body of Commission precedent teaches that it would be inequitable to admit new applicants to a process that some applicants have been pursuing for twelve years. See, for example, Filing Procedures in the MDS and ITFS Services, 10 FCC Rcd 9589, 9631 (1995) and Competitive Bidding in the Broadcast Services, 13 FCC Rcd 15920, 15959 (1998) in which the Commission decided not to open a fundamentally altered comparative proceeding to new filers even when it had the discretion to. Movants position is, if anything, even more deserving of equitable treatment than the applicants in those cases. Accordingly, the

Commission's refusal to limit eligibility in this auction is both directly contrary to the express language of the statute and contrary to its own consistent precedents.

Irreparable Harm. If the Commission has learned anything from the NextWave debacle, it should be that the most serious impediment to the auction process is *uncertainty*. Given the situation that followed Auction 35, firms will be reluctant to tie up large sums of money in auction down payments and upfront payments when the Commission does not have clear title to the assets being auctioned. Here there is no doubt that the Commission has title, but the eligibility of bidders other than original filers is very much up in the air. Holding the auction before this issue is resolved will almost certainly have a chilling effect on the auction process, especially with the NextWave situation fresh in bidders' minds. By holding the auction under a cloud, the Commission will have committed itself to an auction where the proceeds are bound to be reduced by the uncertainty factor. Once the auction is over, even if Movants do not prevail at the Court, the Commission will have needlessly reduced its potential take from the auction; it will be stuck with the diminished proceeds. The results will become fixed and the harm to the public will be irreparable.

Beyond the permanent and irrecoverable loss of funds for the Treasury, there is another element of irreparable harm. Bidders such as Movants may participate in the auction and they will then have to play out their auction strategies. The amounts bid at the auction will be a matter of public record. If Movants win and the auction must be re-done with a more limited number of participants, all participants will know how much each party was willing to bid the first time. This may indicate how much money the bidders had available or how high a value they put on the license. In any case, it will be extremely useful information for competing bidders if the auction has to be re-done. The very type of inter-bidder information

dissemination which the Commission's anti-collusion rules compulsively guard against will have openly occurred.

No harm to other parties. The twelve years which the Commission has taken to award these licenses is a long, long time. In fact, Movants have argued that it was only the extraordinary delay in re-lotteryng these licenses that created the situation we are in today. Under ordinary circumstances, Movants would not want to delay the finalization of this proceeding by another week, much less months. The fact of the matter is, though, that interim operators are providing service in each of the markets now. The public is not going without cellular service. If Movants lose on appeal, everybody in the world can file applications for these systems and they will not have lost anything by the delay. If Movants win on appeal, all those applicants who would have needlessly made upfront payments and tied up their money indefinitely (like the Auction 35 winners) will be spared that horror.

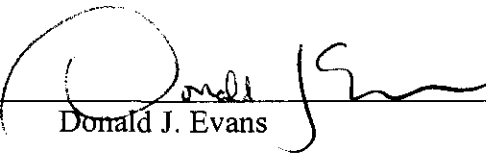
Where lies the public interest? An unbiased assessment of where the public interest lies in this situation would start with the need to speed service to the public in these rural markets. Here that is not a factor since, as noted above, service is already being provided on an interim basis. One might also desire from a public interest standpoint that permanent service be instituted. Award of a permanent license will permit the permanent licensee to actually make the investment in infrastructure and customer commitments that can only come with a long-term investiture in the license. However, in the situation presented even the May 29 auction winner would not be able to count itself a permanent licensee since there is every likelihood that the auction will be overturned on appeal. No right-thinking investor would go forward with permanent improvements and investments in the system on that basis. Delaying

the auction until after the appellate proceedings will serve to increase the take of the Commission from the auction since it can be held with a clear sense of finality. And, lastly, there must be some sympathy for the plight of Movants who filed their applications for these licenses so many years ago, who have persevered in their pursuit of them, and who stand ready even now to bid on the licenses – but in an auction obedient to the mandate of Congress and consistent with the Commission’s prior precedents. Taking all of these elements together, the public interest seems to lie squarely in favor of delaying the auction.

For these reasons, Movants respectfully request that the Commission delay the auction and stay the auction rules pending judicial review.

Respectfully submitted,

RANGER CELLULAR AND  
MILLER COMMUNICATIONS, INC.

By   
Donald J. Evans

Fletcher, Heald & Hildreth, PLC  
13001 North 17<sup>th</sup> Street, 11<sup>th</sup> Floor  
Arlington, VA 22209  
703-812-0400

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Their Attorney